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No. 03-1231

Supreme Court, U.S.
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In The

Supreme Court of the United States

CELENA VENTURELLI,

Petitioner,

v.

ARC COMMUNITY SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT ARC COMMUNITY SERVICES, INC'S. BRIEF IN OPPOSITION

AMY O. BRUCHS
Counsel of Record
NIA ENEMUOH-TRAMMELL
MICHAEL BEST & FRIEDRICH LLP
1 S. Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
(608) 257-3501

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QUESTIONS RESTATED

1. Whether review is warranted because the Seventh Circuit's decision conflicts with Court precedent and circuit decisions applying the "decisionmaker test" to employment discrimination cases?

2. Whether review is needed to examine the manner in which the Seventh Circuit analyzed the evidence on summary judgment?

3. Whether review is warranted to evaluate the manner in which the Seventh Circuit applied the prima facie standard under the indirect method of proof in employment discrimination cases?

4. Whether review is necessary because the Seventh Circuit's ruling that a job offer permitting a pregnant woman to begin employment after she delivers her baby is not, in itself, direct evidence of intentional discrimination conflicts with the Pregnancy Discrimination Act?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

Respondent, ARC Community Services, Inc., has no parent corporation and no publicly held company that owns ten percent or more of its stock.

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OPINIONS BELOW

The unpublished opinion of the United States District Court for the Eastern District of Wisconsin appears in Appendix B of the Petition for Writ of Certiorari (the "Petition"). The United States Court of Appeals for the Seventh Circuit's (the "Seventh Circuit") initial decision, which is reported at 336 F.3d 606, was withdrawn. The Seventh Circuit issued a subsequent decision, which is reported at 350 F.3d 592 and appears in Appendix A of the Petition.

JURISDICTION

The Respondent acknowledges that the Petition was timely filed.

APPLICABLE STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

42 U.S.C. § 2000e-2(m) provides in pertinent part:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e(k) provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

29 U.S.C § 2611(2)(A) provides in pertinent part:

> **In general**. The term "eligible employee" means an employee who has been employed – (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C § 2612(1) provides in pertinent part:

> **Entitlement to leave**. Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. . . .

COUNTERSTATEMENT OF THE CASE

Not only is the Petitioner's Statement of the Case editorialized, she takes liberties with the recitation of the

facts. Thus, this Counterstatement of the Case is necessary to provide the Court with a more complete statement of the case.

ARC Community Services, Inc. (the "Respondent") is a non-profit organization operating in the State of Wisconsin, which is dedicated to providing services to women who are in the criminal justice system, women with problems of substance abuse, and pregnant women. (Dkt. 1, Answer ¶ 2; Dkt. 10, Kinsey Dep. p. 24). Karen Kinsey ("Kinsey") is Respondent's Executive Director. (Dkt. 10, Kinsey Dep. p. 25). In addition to providing supervision to employees, Kinsey is responsible, along with the Assistant Director and the Program Services Director, for hiring and training new staff. (Dkt. 10, Kinsey Dep. pp. 25-32; Exh. 1 of Kinsey Dep.). She supervises Judy Baldwin ("Baldwin"), Respondent's Assistant Director, and Michael Collins ("Collins"), Respondent's controller. (Dkt. 10, Baldwin Dep. p. 7; Collins Dep. p. 5). Pursuant to Respondent's personnel and policy procedure manual, Kinsey is ultimately responsible for hiring and firing Respondent's employees. (Dkt. 10, Kinsey Dep. p. 29).

Celena Venturelli (the "Petitioner") began working at Respondent's administrative office as a temporary receptionist on October 19, 1999 through an assignment from Adecco, an employment placement agency. (Dkt. 10, Venturelli Dep. pp. 7, 21-22, 29, Exh. 2.). At the time Petitioner began her temporary employment with the Respondent, she was visibly pregnant, and she openly discussed her pregnancy with Respondent's staff and employees. (Dkt. 10, Stanley Dep. pp. 10-12). Her baby was due in March, 2000. (Dkt. 10, Venturelli Dep. p. 71). As a temporary employee, the Petitioner reported to Collins when she needed time off from work. (Dkt. 10, Venturelli Dep. p. 23). Collins did not have authority to reprimand Respondent's temporary and permanent clerical staff for poor performance, tardiness or absenteeism. (Dkt. 10, Kinsey

Dep. p. 27; Collins Dep. pp. 32-33). Also, he did not have authority to hire or fire permanent clerical staff. (Dkt. 10, Kinsey Dep. pp. 33-36; Collins Dep. pp. 21-22).

Respondent began advertising for an administrative assistant in November, 1999. (Dkt. 10, Kinsey Dep. p. 46; Venturelli Dep. p. 30). Kinsey, became aware that the Petitioner was interested in the administrative assistant position in November or December 1999. (Dkt. 10, Kinsey Dep. pp. 49-50, 56). Although Respondent received numerous resumes for the position, regret letters were sent to applicants in the winter of 1999. (Dkt. 10, Venturelli Dep. pp. 31-32). In January, 2000, Kinsey instructed Baldwin and Collins that she wanted Petitioner hired as soon as she completed a 520-hour service requirement imposed by Adecco. (Dkt. 10, Kinsey Dep. pp. 8, 11-16; Baldwin Dep. p. 30). Kinsey herself followed up with Petitioner on January 14, 2000, by calling and informing her that Respondent would like to hire her as an employee, and that they should attempt to work something out. (Dkt. 10, Venturelli Dep. pp. 40, 44; Exh. 8 of Venturelli Dep.; Kinsey Dep. pp. 56-57).

Some time after the January, 2000 staff meeting Collins discussed the administrative assistant position with Petitioner. (Dkt. 10, Collins Dep. p. 67). In February, 2000, Baldwin met with Petitioner and offered her the administrative assistant position. (Dkt. 10, Baldwin Dep. pp. 42-44). Baldwin asked Petitioner if she wanted to accept the administrative assistant position. (Dkt. 10, Baldwin Dep. p. 44). Baldwin did not specify a starting date because Petitioner did not state if she wanted the job. (Dkt. 10, Baldwin Dep. pp. 45-46). Petitioner did not immediately accept the administrative assistant position. (Dkt. 10, Baldwin Dep. p. 44). She never told Baldwin that she wanted to start the position before she had her baby. (Dkt. 10, Baldwin Decl., dated 2/28/02, ¶ 5; Venturelli Dep. Exh. 3; Dkt. 1, Compl.).

During the meeting Baldwin also discussed salary and benefits information with the Petitioner, including the availability of health insurance coverage for pregnant employees. (Dkt. 10, Baldwin Dep. pp. 42-43). Unsure of the answer to the health insurance issue, Baldwin, in Petitioner's presence, called Respondent's insurance agency and was informed by a person there that pregnancy would be a pre-existing condition. (Dkt. 10, Baldwin Dep. pp. 42-43; Venturelli Dep. p. 52). Based on the information provided to Baldwin by Respondent's insurance agent, Baldwin told Venturelli that it would not be to her advantage to begin employment before she gave birth to her baby. (Dkt. 10, Baldwin Dep. pp. 46-48; Venturelli Dep. pp. 51-52). Baldwin was unaware at the time she received this information that it was false. (Dkt. 10, Baldwin Dep. pp. 47-48). Baldwin later learned that the person she spoke with at the insurance agent's office misinformed her that pregnancy was a preexisting condition. (Dkt. 10, Baldwin Dep. pp. 46-48).

After Baldwin offered Petitioner the administrative assistant position and before the Petitioner's last day working for Respondent, Kinsey instructed Collins to inform the Petitioner that Respondent was still interested in hiring her, that the position would be held open for her, and that she should notify Respondent about when she would return to the agency. (Dkt. 10, Kinsey Dep. pp. 20, 76). In February, 2000, Collins informed Petitioner that the job was available to her. (Dkt. 10, Collins Dep. p. 74). Respondent stopped advertising for the administrative assistant position after discussing the position with Petitioner. (Dkt. 1, Complaint ¶ 13; Answer ¶ 13).

Petitioner's last day working for Respondent was February 24, 2000. Although the Petitioner completed the 525-hour service requirement on February 10, 2000, the Respondent did not become aware of this fact until after the Petitioner left its employ. (Dkt. 10, Collins Decl., ¶ 5,

dated 2/1/02; Exh., 2 of Collins Decl., dated 2/28/02; Exh. 2 of Venturelli Dep.).

After Petitioner's last day with Respondent, various employees of the Respondent telephoned her and left messages on her answering machine about when she intended to return and fill the administrative assistant position. (Dkt. 10, Venturelli Dep. pp. 77-79; Collins Dep. pp. 88-90, 93; Stanley Dep. p. 28; Kinsey Dep. pp. 80-89; Exh. 1 of Collins Decl.). The Petitioner did not return any of their phone calls. (Dkt. 10, Venturelli Dep. p. 79; Collins Dep. pp. 93-94; Collins Dec., Exh. 1; Stanley Dep. p. 28; Kinsey Dep. pp. 80-81). Although Respondent never heard back from the Petitioner, the agency filled the receptionist position held by Petitioner with three employees that were not "temp-to-hire" because it anticipated that the Petitioner would return and fill the administrative assistant position. (Dkt. 10, Collins Dep. pp. 60, 94-95; Exh. 4, 6-7 of Collins Dep.; Stanley Dep. pp. 28-30). Respondent eventually hired another temporary employee on a permanent basis to fill the position. (Dkt. 10, Schleif Dep. p. 5, dated 2/15/02; Exh. 7 of Collins Dep.). That employee was offered the position while she was visibly pregnant. (Dkt. 10 Kinsey Dep. p. 85; Stanley Dep. p. 2).

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari fails to identify any issue making this case an appropriate one for review under Rule 10 of the Supreme Court Rules. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955), this Court stated that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." This case falls

far below the Court's standard for granting review, and the Petition should be denied.

I. THE CIRCUITS HAVE SUFFICIENT GUIDANCE IN DETERMINING WHEN AN INDIVIDUAL IS A DECISIONMAKER UNDER TITLE VII DISCRIMINATION CASES.

The Petitioner implores the Court to accept review of this case so that it may clarify when an individual is a "decisionmaker" under Title VII. (Petition for Writ of Certiorari, pp. 9-18, hereinafter Pet., at ___). The Petitioner argues that the lower courts have "inconsistently" applied various tests used by the circuits in deciding whether someone is a decisionmaker. *Id.* The Petitioner's attempt to portray dissonance between the various tests used by the circuits is nothing more than a ruse that should not sway this Court to grant certiorari. The circuits have sufficient guidance to determine whether an individual is a decisionmaker in the context of an employment discrimination case. Moreover, the Petitioner's argument that the circuits have inconsistently applied the applicable tests is illusory. This is evidenced by her utter failure to identify any true inconsistency in the manner that the circuits have interpreted and applied existing Court precedent.

A. The Court's Decision In *Reeves* Adequately Guides Lower Courts In Deciding When An Individual Is A Decisionmaker In Employment Discrimination Cases.

At best, the Petitioner's first argument fails to appreciate the value and impact of existing Court precedent evaluating whether a person is a decisionmaker under Title VII. The Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-53 (2000), addresses

whether an employer could be liable in a disparate treatment case for the discriminatory animus harbored by a supervisory employee. In resolving *Reeves,* the Court defined the general parameters of when a supervisor's discriminatory animus would be sufficiently probative of an employer's intent to discriminate.

Reeves sued his former employer claiming that the president of the company terminated him because of his age in violation of the Age Discrimination in Employment Act. *Id.* at 137-38. At trial, Reeves presented evidence that his supervisor had made ageist remarks, including a comment that Reeves was too "old to do his job." *Id.* at 151. Reeves also offered evidence that his supervisor, who was the president's husband, recommended the termination. *Id.* The president attempted to rebut Reeves' claims by testifying that she fired him because he falsified company pay records. *Id.* at 152. The Fifth Circuit found that the supervisor's comments were merely stray remarks because they were not made in the direct context of Reeves' termination. *Id.* at 152-53.

On review, this Court disagreed. *Id.* The Court concluded that there was sufficient evidence for the jury to find that the employer intentionally discriminated because the supervisor was motivated by discriminatory animus and he was principally responsible for Reeves' termination. *Id.* The Court relied on evidence that the supervisor, who was married to the official decisionmaker, wielded "absolute power" within the company and employees feared him. *Id.* at 152. *Reeves* instructs the lower courts that a supervisory actor, albeit not the official decisionmaker, may still be deemed a de facto decisionmaker if there is sufficient evidence that he infected the decisionmaking process with his discriminatory animus.

Petitioner cites various pre-*Reeves* and post-*Reeves* cases to demonstrate that the lower courts lack guidance in interpreting *Reeves*.[1] However, merely pointing to distinctions in the language used by the circuits to describe the decisionmaker test does not establish that the various standards conflict. Notably, the Petitioner cites to the pre-*Reeves* cases without demonstrating that the approach employed by each circuit in applying the decisionmaker test remains viable in light of *Reeves*. Even if the Petitioner had made such a showing, the pre-*Reeves* cases that she relies upon show that the approaches taken by these circuits are in harmony with *Reeves*. Similarly, the different approaches used by the circuits in the post-*Reeves* cases are consistent with *Reeves*. All of these cases demonstrate that in evaluating whether an individual is a decisionmaker, the circuits scrutinize the evidence to determine who actually made or influenced the decision, regardless of title or the employer's arguments as to who "officially" made a decision. Regardless of the label Petitioner slaps on each of the approaches used by the circuits, each test rests on the same principles articulated by the Court in *Reeves*.

The Court was perhaps acting prophetically in *Reeves* by articulating a flexible test for deciding when an individual is a decisionmaker in the context of an employment discrimination case. Entertaining the Petitioner's request to define a more rigid, formulistic test would undoubtedly create confusion in the circuits, not remedy any purported

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[1] Based on the cases cited by the Petitioner, all of the identified circuits apparently use the approach she labels as the "influence test". The Fifth, Seventh and Eighth Circuits have also applied what she has dubbed as the "position in the company" test. Finally, the cited cases indicate that pre-*Reeves*, the First and Sixth Circuits also applied what she calls the "atmosphere test" and that the Seventh Circuit applied what she describes as the "agency test".

confusion. A rigid test could not effectively or fairly be applied to every employer and the managing framework they choose to implement.

For the Petitioner to now argue that the circuits have been misguided with respect to the decisionmaker test is telling. In the lower court, she embraced and exploited the tests applied by the circuits to support her discrimination case. She never charged that any of the tests conflicted with *Reeves* or the law of any other circuit. Having lost on each theory, she now seeks to change the legal landscape to ensure her victory. She cannot have it both ways. The general rule articulated in *Reeves* about when an individual is a decisionmaker under Title VII is a sound approach, which permits the lower courts to adapt the standard to the specific facts of the case being decided. Because there is no evidence that the lower courts are confused in their interpretation of *Reeves*, there is no need for the Court to refine or clarify the *Reeves* decision.

B. The Circuit Decisions Are Consistent With Each Other.

The Petitioner also argues that there is conflict among the circuits in their application of the decisionmaker test. (Pet., 11-19). A conflict arises in the context of certiorari decisions when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, *Supreme Court Practice* 226 (8th ed. 2002). Although the Petitioner cites to a litany of cases to support her argument that the circuits' decisions are in disarray, she has not identified any true inconsistencies in the circuits' application of the decisionmaker test. *Id.* The different results in those cases are attributable to the different facts presented to the circuits.

1. The *Venturelli* decision does not conflict with the "position in the company" cases cited by the Petitioner.

The Petitioner faults the Seventh Circuit for not holding that Collins' position within the company rendered him the actual decisionmaker in the decision to hire her. (Pet. at 12). The Seventh Circuit found that it was not enough for the Petitioner to show that Collins was part of Respondent's management team and that he provided input to Kinsey, the official decisionmaker, about applicants' qualifications. *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 600 (7th Cir. 2003) (slip op. at 9-10). She must show that Collins influenced Kinsey not to hire the Petitioner. *Id.* Because the only evidence demonstrated that Collins influenced Kinsey to actually offer the position to Petitioner, the court found that Collins was not a decisionmaker. *Id.* Petitioner argues that *Venturelli* is inconsistent with decisions rendered by the Fifth and Eight Circuits. (Pet., at 12).

In the decisions cited by the Petitioner, the courts reached different results than *Venturelli* because they were faced with different facts. For example, in *Evans v. City of Bishop*, 238 F.3d 586, 588 (5th Cir. 2000), the City of Bishop city council took an adverse employment action against the plaintiff by approving the mayor's decision to hire an applicant other than the plaintiff. One of the city council members had made racist remarks and had worked to defeat the plaintiff, a former council member, in his re-election campaign. *Id.* at 588-92. Relying on *Reeves*, the Fifth Circuit found this evidence was probative of whether the employer's true motive for not hiring the plaintiff was discriminatory. *Id.* at 591 n.11. The court reached a different outcome than *Venturelli* because there was evidence that the council member may have influenced the employer not to hire the plaintiff.

Petitioner's other case, *Morse v. Southern Union Co.*, 174 F.3d 917, 920-23 (8th Cir. 1999), *cert. denied*, 527 U.S. 1059 (1999), involved a situation where the plaintiff alleged he was fired because of his age. There, the president of the company held a meeting with supervisors and encouraged them to replace older employees with younger employees. *Id.* at 920-21. The plaintiff's supervisor, who had attended this meeting, later terminated the plaintiff. *Id.* at 921. There was also evidence that the supervisor had made ageist remarks to the plaintiff. *Id.* The court found that the jury reasonably could have inferred that the president's comments motivated the supervisor to terminate the plaintiff. *Id.* at 923. As with *Evans*, this case is distinguishable from *Venturelli* because there was evidence that the president may have influenced the supervisor to fire the plaintiff. Moreover, the president, unlike Collins, was so high up in the chain of command that his ability to influence subordinates was hardly negligible. *Id.* at 922.

Although the Petitioner claims that the Seventh Circuit departed from its use of the "position in the company" test, the *Venturelli* court properly declined to use this test to find that Collins was a decisionmaker.[2] There is no evidence that Collins, by virtue of his position within the Respondent agency, influenced Kinsey not to hire the Petitioner.

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[2] In the case referenced by the Petitioner, *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730 (7th Cir. 1998), the Seventh Circuit alluded to the "position in the company" test, but declined to find that a former high-ranking official influenced the official decisionmaker's decision to fire the plaintiffs. *Id.* at 733.

2. The "influence" test cases cited by the Petitioner do not conflict with each other.

Equally unavailing is the Petitioner's argument that the circuits have inconsistently applied the "influence" test to decisionmaker cases. She notes that the First, Sixth, Eighth, Seventh and Tenth Circuits have applied this test and reached different results from decisions rendered in other cases. (Pet., 13-15). Petitioner once again ignores critical factual distinctions, which warranted the outcomes of each of these cases.

a. *Venturelli* is distinguishable from the decisions rendered by the circuits identified by the Petitioner.

In all the cases that Petitioner claims support a different result in *Venturelli*, the courts had good reason to find that the subordinates had the requisite amount of influence on the decisionmaking process to be labeled de facto decisionmakers. For example, in *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50-52, 55 (1st Cir. 2000), the court found that a jury could view the employer's proffered reasons for terminating the plaintiff were pretextual where both the "key" decisionmaker and the plaintiff's supervisor made sexist comments to the plaintiff. The court noted that the supervisor was in a position to influence the "key" decisionmaker because he had daily discussions with the key decisionmaker during a significant phase for the company when the plaintiff worked at the company. *Id.* at 55. Furthermore, the "key" decisionmaker asked for the supervisor's opinion when deciding whether to fire the plaintiff. *Id.* Just two weeks prior to this, the "key" decisionmaker had no intention of terminating the plaintiff. *Id.* In *Venturelli*, there is no evidence that Kinsey, the "key" decisionmaker, harbored any discriminatory animus against pregnant women. *Venturelli*, 350 F.3d at 600-601 (slip op. at 9-10). Also, as

discussed above, the evidence only reveals that Collins influenced her to hire the Petitioner. *Id.*

The second case cited by the Petitioner, *Mohr v. Dustrol, Inc.*, 306 F.3d 636 (8th Cir. 2002) is also easily distinguished. The evidence in *Mohr* revealed that the plaintiff's supervisor harbored discriminatory animus. *Id.* at 639-41. On summary judgment, the employer tried to divorce the supervisor from the decisionmaking process by arguing that others made the official decision to terminate the plaintiff. *Id.* However, the court found that official decisionmakers merely "deferred" to the supervisor in their decision to fire the plaintiff. *Id.* The *Venturelli* case is different because there is no evidence that Kinsey "deferred" her decision to Collins or that Collins influenced her not to hire the Petitioner.

Likewise, the Petitioner's reliance on *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000) is also misplaced. The evidence there showed that the supervisors, who allegedly made sexist remarks, had "unilateral" power to take the adverse employment action they took against the plaintiffs. *Id.* at 1199, n.12. This simply was not the case in *Venturelli.* Collins lacked authority to take any sort of adverse employment action against the Petitioner. *Venturelli*, slip op. at 9.

As with all of these other cases, the facts of *Hunt v. City of Markhan*, 219 F.3d 649, 651-53 (7th Cir. 2000) compelled a different result than the one reached in *Venturelli*. In *Hunt*, the mayor and other city officials, who were mostly black, allegedly repeated racist remarks targeted at white police officers employed by the City. *Id.* at 652. At a city council meeting, the mayor commented that the white officers were "not worth anything". *Id.* When pressed about the comment, the mayor suggested that he made the comments only because the officers were white. *Id.* The plaintiffs sued the City, complaining that they were denied raises because of their race, and that one

of them was constructively discharged upon learning from the police chief that he would never meet the mayor's expectations. *Id.* The Seventh Circuit found that, although the mayor did not vote at city council meetings, he recommended actions to them, including whether city employees deserved raises. *Id.* at 653. The court found that the mayor's comments became evidence of discrimination because they arose from a source that influenced the employer to deny raises to the plaintiffs. *Id.* In our case, Collins' impact in the decisionmaking process only encouraged Kinsey to hire the Petitioner.

Finally, the Petitioner claims that the Fifth Circuit's decision in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) conflicts with *Venturelli*. It does not. In *Ercegovich,* the plaintiff sued his employer after his job was eliminated, claiming that the decision was motivated by his age. *Id.* at 349-50. The plaintiff presented evidence that several high-ranking officials made ageist comments. *Id.* at 354. Her offer of proof included evidence that the vice president had a preference for younger employees and wanted to see older employees retire. *Id.* The employer tried to separate the vice president's comments from the actions of the employer's human resources department, which officially made the decision to eliminate the plaintiff's position. *Id.* at 355. However, the court found that the vice president's comments supported an inference of discriminatory intent. *Id.* at 356. This outcome is not surprising because the vice president gave input into the decisionmaking process, and he was a high ranking company official to whom the head of the human resources reported. *Id.* at 355. He was undoubtedly in a position to influence the human resources department to eliminate the plaintiff's position. In the *Venturelli* case, though, Collins was subordinate to Kinsey, and there was no evidence that he influenced her not to hire the Petitioner.

As amply demonstrated, the cases cited by the Petitioner fail to demonstrate that the *Venturelli* decision conflicts with other circuit decisions.[3] Indeed, these cases only confirm that the Seventh Circuit reached the correct decision about whether Collins was a decisionmaker.

b. The Third and Fifth Circuits' application of the "influence" test does not conflict with other circuit decisions.

The Petitioner also argues that the Third and Fifth Circuits' "rejection" of the influence test creates a conflict worthy of the Court's review of this case. This purported conflict is not only elusive, it is immaterial to the outcome of the *Venturelli* case.

The Fifth Circuit refused to apply the "influence" test in *Rubinstein v. Administrators of the Tulane Educational Fund,* 218 F.3d 392 (5th Cir. 2000), for good reasons. In a subsequent case, the court explained its decision and reconciled *Rubinstein* with its jurisprudence on the test. Essentially, the court found that the plaintiff fell into an exception created by *Reeves*:

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[3] The Petitioner also cites to *Bickerstaff v. Vassar College*, 196 F.3d 435, 450 (2d Cir. 1999) for the proposition that even absent bias on the part of the decisionmaker, a biased nondecisionmaker may nonetheless taint the decisionmaking process if he played a role in that process. Even *Bickerstaff* supports the Seventh Circuit's decision that it is not enough for a plaintiff to merely show that the nondecisionmaker played a role in the decisionmaking process. There, the court found that the biased comments of a student who helped prepare a report on the plaintiff's entitlement to a promotion was not evidence of the employer's discriminatory intent. *Id.* at 450-51. The court found that the student did not play a meaningful role in the employer's decision to deny the plaintiff the promotion. *Id.* This is consistent with the Seventh Circuit's admonition that Petitioner must show more than evidence that Collins was a "member" of the Respondent's management team.

> [the] evidence . . . was so overwhelming as to make summary judgment for the employer appropriate in spite of evidence of discriminatory animus in the form of remarks that the plaintiff wholly failed to tie to any potentially relevant time frame. . . . *Rubinstein* stands only for the proposition that an overwhelming case that the adverse employment actions at issue were attributable to a legitimate, nondiscriminatory reason will not be defeated by remarks that have no link whatsoever to any potentially relevant time frame. Were we to read more into *Rubinstein* in this regard, it would be in direct conflict with *Reeves*.

Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 n.19 (5th Cir. 2000).[4] The court's decision in *Rubinstein* was clearly justified by the facts of that case and it by no means conflicts with other circuit precedent.

Similarly, the Petitioner has failed to show that the pre-*Reeves* decision *Pivirotto v. Innovative Systems, Inc.*,

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[4] In *Russell*, the court found that a jury could have found that a manager, who allegedly made ageist comments, was principally responsible for the plaintiff's termination even though he was not the official decisionmaker. The court found that the manager wielded enough influence to impact the decision to terminate the plaintiff. *Id.* at 228. The court reached this conclusion after considering the following evidence: (1) the manager's father was the Chief Executive Officer ("CEO") of the company; (2) the official decisionmaker's budget was controlled by the CEO; (3) the manager unilaterally transferred another employee, whom the official decisionmaker supervised, without the decisionmaker's knowledge or consent; (4) after the manager informed the official decisionmaker that he would quit if she did not fire the plaintiff, the official decisionmaker cried to her assistant about the comment; and (5) the official decisionmaker told the plaintiff that she did not want to lose her job over the tension between the manager and the plaintiff. *Id.* at 228. On these facts, *Russell* is clearly distinguishable from *Venturelli*.

191 F.3d 344 (3d Cir. 1999) is inconsistent with other circuit cases. There, the court refused to find that the sexist remarks allegedly made by the chairman of a company, who was the official decisionmaker, evidenced the employer's intent to discriminate. *Id.* at 348-49, 359. The chief operating officer, whom the chairman hired to run the day-to-day operations of the company, terminated the plaintiff. *Id.* at 349. The court found that the chairman merely ratified this decision. *Id.* at 359. In so holding, the court noted that the chairman initially agreed to hire the plaintiff to a top position within the company, and that he expressed interest in salvaging the situation and retaining the plaintiff as an employee. *Id.* None of the other cases cited by the Petitioner involved facts demonstrating that the official decisionmaker made inquiries to determine whether it was feasible to retain the employee.

3. The *Venturelli* decision does not conflict with the Seventh Circuit's decision in *Oxman*.

There is also no conflict between *Venturelli* and *Oxman v. WLS-TV,* 846 F.2d 448, 456-457 (7th Cir. 1988), a pre-*Reeves* case decided by the Seventh Circuit. The Petitioner argues that the *Venturelli* court erred by not following *Oxman* and finding that Collins' remarks could have been imputed to the Respondent because he carried out the employment decision. (Pet., at 15). In addition to failing to show that the court's reasoning in *Oxman* survived the *Reeves* decision, the Petitioner ignores the factual differences between *Oxman* and *Venturelli*.

In *Oxman*, the only person who communicated with the plaintiff regarding his termination was a subordinate to the actual decisionmaker and that communication came after the decision to terminate the plaintiff had been made. *Oxman,* 846 F.2d at 456-57. Under those circumstances, the court determined that it was reasonable to

infer that the reasons given by the subordinate were those authorized by the decisionmaker. *Id.* However, those are not the facts in this case. The evidence in *Venturelli* showed that Baldwin offered the job to Petitioner while she was still pregnant and, as the Seventh Circuit found, there was no direct evidence of discrimination on her part. *Venturelli*, 350 F.3d at 597-99 (slip op. 4-6, 8). Moreover, Collins' discussions with Petitioner regarding her pregnancy occurred before the offer by Baldwin, not after, like in *Oxman*. *Id.* Indeed, it would be illogical to impute an alleged discriminatory intent by Collins to Kinsey, when Baldwin offered the job to the Petitioner at a later time but while she was still pregnant.[5]

4. The Seventh Circuit's reluctance to apply the "atmosphere" test in *Venturelli* and *Swanson* does not create a conflict between the circuits.

The Petitioner's last argument on the conflicts issue is that the Seventh Circuit's decisions in *Venturelli* and *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730 (7th Cir. 1998), conflict with cases from the First and Sixth Circuit that apply what she calls the "atmosphere" test. (Pet., at

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[5] The Petitioner suggests that the court also erred by making a credibility determination in discrediting Collins' testimony that Kinsey only authorized him to offer the Petitioner a job that permitted her to begin working after she delivered her baby. (Pet., at 15). Even if the Court accepted her argument on this issue, it is entirely immaterial to the issue of whether this Court should accept this case for review. As the Seventh Circuit found, an offer of employment to a pregnant woman starting sometime after she delivers her baby is not, standing alone, evidence of discriminatory intent on the part of the employer. Thus, whether the court believed Kinsey's testimony that she authorized a job offer with an immediate start date over Collins' testimony is irrelevant to the Court's inquiry.

16-17). This argument fails just like the others. Both of these pre-*Reeves*[6] cases are easily distinguished from the Seventh Circuit cases.

In *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596-98 (1st Cir. 1987), the evidence revealed that when two female employees approached each of their managers to discuss a raise, each manager allegedly made sexist remarks and denied the raises. The court found that this occurrence was probably not just coincidence, and could be probative of the employer's "corporate state-of-mind". In *Ercegovich*, the court found that isolated ageist comments by senior officials, coupled with numerous ageist remarks by other highly-ranked individuals employed by the employer might reflect a "cumulative managerial attitude" among the employer's managers. *Ercegovich*, 154 F.3d at 356-57.

The Petitioner has not shown that a similar environment existed at Respondent's workplace. This is precisely the reason the court reached a different result in *Venturelli*. Furthermore, the Seventh Circuit properly reached

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[6] The Fifth Circuit's decision in *Rios v. Rossotti*, 252 F.3d 375, 378-380 (5th Cir. 2001) demonstrates how the circuits can easily reconcile the "atmosphere" test and the standard articulated in *Reeves*. The plaintiffs in *Rios* offered affidavits that suggested that their employer had an atmosphere that was hostile to Hispanic employees as evidence of discrimination. *Id.* at 379. Although the court acknowledged that this evidence could "evince a pattern of discrimination sufficient" to rebut the employer's stated reasons for the employment decision, it ruled that under *Reeves*, the plaintiffs had to establish that the comments were made by those who were principally responsible for the adverse employment decision. *Id.* at 379. The court then concluded that the strongest evidence presented by the plaintiffs failed to show that any of the comments alleged in one of the affidavits could be attributed to the decisionmakers. *Id.* The court also found that a rational jury could not conclude that the comments were made by anyone who had influence over the decisionmakers. *Id.*

the conclusion it did in *Swanson*. There, the plaintiff's only evidence of the employer's alleged discriminatory atmosphere was a comment made by a lower level supervisor, who frequented the same bar as company officials accused of harboring discriminatory animus. *Swanson*, 154 F.3d at 733. That supervisor told the plaintiff that the employer was going to terminate all of its older employees. *Id.* The court properly rejected plaintiff's specious argument, concluding that the evidence that the supervisor may have socialized with company officials did not show that she had knowledge of the decisionmaker's motives for terminating the plaintiff. *Id.* at 734.

The Petitioner elides critical distinctions in the cases she claims are in conflict. Once those distinctions are properly analyzed it is clear that the cited lower court decisions are in harmony with *Reeves* and each other. The Court should not grant certiorari to resolve the invented conflicts the Petitioner claims pervades the circuits.

II. THE SEVENTH CIRCUIT CONSIDERED THE TOTALITY OF THE EVIDENCE IN CONCLUDING THAT RESPONDENT DID NOT INTENTIONALLY DISCRIMINATE AGAINST THE PETITIONER.

The Petitioner's second argument in support of review concerns whether the Seventh Circuit correctly applied the "totality of the evidence" standard in granting summary judgment in favor of the Respondent. She maintains that the court failed to consider the totality of the evidence by not properly considering the aggregate impact of the direct and circumstantial evidence she presented for her direct method case. (Pet., at 24-27). The Petitioner, however, has failed to demonstrate that the Seventh Circuit's approach here warrants certiorari review.

In the lower courts, the Petitioner elected to prove her discrimination case using both the direct and indirect

methods of proof. The Seventh Circuit has adopted a rule that permits plaintiffs to prove their direct method case by using direct evidence or a mosaic of circumstantial evidence to build "direct" evidence of discrimination. *Venturelli,* 350 F.3d at 601 (slip op. 12) (citing *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)). For her direct method case, the Petitioner not only presented direct evidence, but she offered other evidence that she claimed added up to direct evidence of discriminatory intent. *Venturelli,* 350 F.3d at 601 (slip op. 11). After reviewing the evidence, and drawing all reasonable inferences in favor of the Petitioner, the court concluded that none of the evidence it considered amounted to direct evidence of discrimination.

Specifically, the court found that even though Collins testified that Kinsey only authorized him to offer the Petitioner a job that allowed her to start after she delivered her baby, this evidence was not, in itself, direct evidence of discrimination on the part of Kinsey. *Id.* at 599 (slip op. 7-8). The court then considered additional circumstantial evidence presented by the Petitioner. *Id.* at 601-602 (slip op. 12-14). The Petitioner claims that when the court considered her circumstantial evidence, it ignored her claims that Kinsey had been trying to fill the position for months and had wanted to fill the position as soon as possible. (Pet., at 21-22). She argues that had the court done so, it would have found evidence of discriminatory intent.

In making this argument, the Petitioner herself is guilty of encouraging the court to use the very same piecemeal approach that she complains about. Her selective citation of the record completely ignores other facts relevant to the inquiry, including evidence that the Respondent rejected all other applicants for the position in the winter of 1999, and then stopped advertising for the position after Kinsey made the decision to hire the Petitioner. (Dkt. 10, Kinsey Dep. p. 46; Venturelli Dep. pp. 30-32, Complaint ¶ 13; Answer ¶ 13). The court expressly

acknowledged the latter piece of evidence in the decision. *Venturelli,* 350 F.3d at 603 (slip op. 16). In light of these facts, it is no wonder that the court did not give weight to the Petitioner's proffered evidence. Indeed, if all of the pertinent evidence is considered, the totality of the evidence actually undermines the Petitioner's argument that there was direct evidence of discrimination as to Kinsey.

After finding no direct evidence of discriminatory intent as to Kinsey, the court evaluated whether there was direct evidence of discrimination on the part of Baldwin. The Petitioner argued to the court that Baldwin told her that the Respondent was going to wait until after her pregnancy to hire her. (Pet., at 8-9). There is no dispute that the court considered both the direct and circumstantial evidence proffered by the Petitioner. *Id.* Even after doing so, the court was unable to find any direct evidence of discriminatory intent on the part of Baldwin. *Id.* The Petitioner merely disagrees with the court's treatment of the evidence. However, on summary judgment, the court is not required to draw any and all inferences in favor of the Petitioner, it is only required to draw reasonable ones. *See, e.g., Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1139 (7th Cir. 1997). The court found that it could not draw the inferences urged by the Petitioner because her own evidence negated her theory. (Pet., at 8-9, n.2). This Court should not accept review of this case because there is no evidence that the Seventh Circuit failed to consider the totality of the evidence in deciding Respondent's summary judgment motion.[7]

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[7] The Petitioner also cites to *Chuang v. University of California Davis*, 225 F.3d 1115, 1128 (9th Cir. 2000) to suggest that there is a conflict between the Seventh and Ninth Circuits with regard to the amount of direct evidence required to establish discriminatory intent under the direct method of proof. (Pet., at 23-24). She states that the

(Continued on following page)

III. THE SEVENTH CIRCUIT APPLIED THE PROPER TEST TO THE PETITIONER'S PRIMA FACIE CASE UNDER THE INDIRECT METHOD OF PROOF.

The third argument raised in the Petition relates to the Seventh Circuit's treatment of the Petitioner's prima facie case under the indirect method of proof. The Petitioner argues that the court applied a "new" prima facie standard to her discrimination case. (Pet., 24-27). However, a closer examination of the *Venturelli* decision demonstrates that the court understood its mission in analyzing the Petitioner's prima facie case. The court's later use of the word "because of her pregnancy" in connection to the third element of the prima facie case standard was merely semantical.

In the Seventh Circuit, the Respondent argued that the Petitioner failed to meet the third element of her prima facie case because she was offered a job with the Respondent. *Venturelli,* 350 F.3d at 602 (slip op. 14-17). In contrast, the Petitioner argued that this was not really a job offer because it did not permit her to begin working on a permanent basis prior to delivering her baby. *Id.* at 602-603. Although the court could not deny that there was a job offer on the table, albeit for sometime in the future, it nonetheless addressed the Petitioner's convoluted argument that the job offer was not really a job offer. *Id.*

Ninth Circuit requires "very little" direct evidence, while the Seventh Circuit requires "nothing less than an admission of discrimination." *Id.* The Petitioner misstates the Seventh Circuit's standard. In addition to permitting plaintiffs to submit obvious admissions of discrimination, the court also will consider "bits of evidence that lend circumstantial support to inferences of discrimination." *Venturelli*, 350 F.3d at 601 (slip op. at 11). It is difficult to understand how the two standards conflict.

In the first sentence of its analysis, the court properly stated the standard for the Petitioner's prima facie case:

> [Petitioner] must show that: (1) she was pregnant; (2) she applied and was qualified for the position sought; (3) she was rejected; and (4) the position remained open and ARC continued to seek applicants from persons of Venturelli's qualifications. . . . An alternate means of proving prong four is to establish that someone who was not pregnant received more favorable treatment. (internal citations omitted).

Id. at 602 (slip op. at 14). Upon review of the record, the court was unable to conclude whether the Respondent would or would not have offered the position to the Petitioner while she was still pregnant. The court's use of the language "because of her pregnancy" was nothing more than a less than artful way of explaining that the Petitioner had failed to establish her own argument that she was not offered the job while she was pregnant. It is clear that the court did not impose a heavier burden on the Petitioner.

In any event, even if the Court finds that the Seventh Circuit misstated the prima facie standard here, there is still no compelling reason for the court to accept review of this case. The "because of her pregnancy" language used by the court in evaluating the third prong of the prima facie standard is "superfluous to the correct test." *See, e.g., Johnson v. Wolff's Clothiers, Inc.*, 663 F.2d 800, 803 (8th Cir. 1981). It is merely a "restatement of the ultimate result of the test if the first four elements are established." *Id.* Thus, the "semantical error" does not warrant certiorari review of this case. *Id.* Also, the court's alleged misstatement of the test would amount to nothing more than harmless error, not necessitating a different result in this case, as the court also found that the Petitioner failed to establish the fourth element of her prima facie case.

Furthermore, the court did not impose a heavier burden on the Petitioner because it made a passing reference to her failure to approach Kinsey about the alleged comments made by Baldwin and Collins. (Pet., 25-26). Again, this all tied into Petitioner's argument that there was effectively no job offer because the Respondent would only allow her to begin the job after she was no longer pregnant. The court noted that the record might have been clearer on this issue had there been more evidence on the decisionmaker's state of mind. Thus, the court was only stating that had the Peititioner talked to Kinsey, the decisionmaker, it may have illuminated whether she had any discriminatory intent. The court was not articulating a "new" prima facie standard in this case.

IV. THE PDA DOES NOT REQUIRE PREFERENTIAL TREATMENT FOR PREGNANT WOMEN, ONLY EQUAL TREATMENT.

Petitioner's final diatribe focuses on the Seventh Circuit's conclusion that a job offer that permits a pregnant woman to begin a position sometime in the future does not, in itself, prove a violation of the Pregnancy Discrimination Act (the "PDA"). (Pet. 27-29). The Petitioner's argument on this issue exemplifies her gross misunderstanding of the PDA, and demonstrates that there is no compelling reason for the Supreme Court to review this case.

The PDA is not an accommodations statute. It does not require employers to treat pregnant women better than other prospective or current employees. *See* 42 U.S.C. § 2000e(k). The PDA only requires employers to treat pregnant employees the same as similarly situated employees. *Id.* The Petitioner is dismissive of this reality, although it is painstakingly clear from the plain language and legislative history of the PDA.

In 1974 and 1976, the United States Supreme Court issued two decisions that served as the catalyst for Congress to change how pregnancy is treated under Title VII. The first case, *Geduldig v. Aiello*, 417 U.S. 484 (1974), concluded that a state disability insurance program which denied benefits for normal pregnancy did not violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. The Supreme Court found that the program did not treat men and women differently, but rather distinguished between pregnant and nonpregnant persons. *Geduldig,* 417 U.S. at 496 n.20. In 1976, the Supreme Court expanded its holding in *Geduldig* to apply to Title VII. *See General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976) (holding that disability insurance plans that excluded coverage for pregnancy and related conditions did not constitute sex discrimination under Title VII).

Within two years of the Supreme Court's decision in *Gilbert,* Congress enacted the PDA, which reads as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)). The plain language of the PDA requires employers to ignore an employee's pregnancy, but not her absence from work, unless the employer ignores the same for similarly situated nonpregnant employees. *See Troupe v. May Dept. Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994) (citing *Maganuco v. Leyden*

Community High School Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991)).

Statements in the legislative history support this conclusion, and "make it clear that the PDA does not require employers to extend any benefit to pregnant women that they do not already provide to other disabled employees." *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1317 (11th Cir. 1994). Various sponsors of the PDA tried to temper any overly expansive reading of the PDA by emphasizing that it only required employers to treat pregnancy the same as other disabilities. S. Rep. No. 95-331, at 4 (1977). These comments were offered on the issue during the Congressional debate on the PDA:

> The bill, because it would operate as part of Title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits or any other matter. . . .
>
> This bill makes it clear that an employer must . . . provide benefits on an equal basis, if he does so at all. It does not, however, require that an employer do anything more for his pregnant employees than he does for any other employees.

S. Rep. No. 95-331, at 4 (1977). Even critics of the PDA base their complaints on the concession that the language of the PDA "does not require employers to recognize women's caregiving responsibilities beyond the immediate,

physical events of pregnancy and childbirth."[8] See e.g., Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Ref. 371, 374, 398 (2001) (Also acknowledging that "courts addressing similar situations have uniformly held that needs or conditions of a child that require a mother's presence are not within the scope of the PDA." *Id.* at 399.).

The PDA does not, as she suggests, require an employer to ignore a woman's impending pregnancy leave. This is the exact same principle embraced by the Seventh Circuit in *Venturelli*. Because the Seventh Circuit's decision does not conflict with the PDA, the court need not grant review to review this issue.

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[8] The federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. ("FMLA") and similar state laws generally guarantee a woman's right to take maternity leave and to be reinstated to her former position thereafter. The FMLA's protections apply only to employees who have already demonstrated a loyalty to the employer, by having been employed by the employer for at least 12 months and having worked at least 1250 hours in the previous 12 months. 29 U.S.C. § 2611. However, because Petitioner was a new employee, the FMLA is not at issue in this case.

CONCLUSION

Based on the foregoing, the Petitioner's request for review should be denied.

Respectfully submitted this 1st day of April, 2004.

Attorneys for the Respondent,
ARC Community Services, Inc.

AMY O. BRUCHS
Counsel of Record
NIA ENEMUOH-TRAMMELL
MICHAEL BEST & FRIEDRICH LLP
1 S. Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
(608) 257-3501